United States Courts
Southern District of Texas
FILED

FEB 2 7 2006

Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE UNITED STATES OF AMERICA	*	
	*	
VS.	*	CRIMINAL NO. C-05-00505-001
	*	
SEAN PATRICK GRAHAM	*	

DEFENDANT'S AMENDED RESPONSE TO PRESENTENCE REPORT: ADDITIONAL DEFENSE RECOMMENDATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, **SEAN PATRICK GRAHAM,** by and through his undersigned counsel, and in addition to the Defendant's Response to Presentence Investigation Report previously filed, submits as follows:

Because the Defendant plead guilty to a one count indictment charging him with Possession with Intent to Distribute approximately 950 grams of a **mixture** containing methamphetamine, and under the authority of *Ring v. Arizona*, 536 U.S. 584 (2002), Defendant submits that his base offense level should properly be calculated at Level 32 based on said 950 grams of methamphetamine mix. To the extent that U.S.S.G. § 2D1.1 authorizes a base offense level to be established based on a different quantity derived from a percentage of **pure** methamphetamine, said guideline is violative of *Ring*.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that any fact (other than a prior conviction) that increased the maximum sentence had to be proved to a jury beyond a reasonable doubt. *Id.* The Court stated due process protections extend "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Id.* at 484. In *Ring*, the Court made clear that any "increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602. In *United States v. Booker,* 125 S. Ct. 738 (2005), the majority repeated, in the context of the right to have the jury find facts, that facts must be "reflected in the jury verdict or admitted by the defendant." *Booker* therefore left the precedent in place requiring proof beyond a reasonable doubt of factors increasing the offense level.

Defendant submits that because he knowingly and voluntarily plead guilty to 950 grams of meth **mix**, that his base offense level must be determined based on this admission alone. Defendant respectfully urges the Court to consider this argument in conjunction with the following authority: *United States v. Booker,* 125 S. Ct. 738 (2005); *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and begin the Defendant's guideline calculations with a base offense level 32.

Respectfully Submitted,

SCOTT M. ELLISON
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ATTORNEY FOR DEFENDANT,
SEAN PATRICK GRAHAM

CERTIFICATE OF SERVICE

A true copy of the above and foregoing instrument was faxed to Patti Booth, Assistant United States Attorney in charge of the above-styled and numbered cause, at (361) 888-3200, and to Bernadette Rojas Howard, United States Probation Officer, United States Probation Office, 1133 N. Shoreline Blvd., Corpus Christi, TX 78401 on this 24th day of February, 2006.

SCOTT M. ELLISON

CERTIFICATE OF CONSULTATION

I hereby certify that I have contacted Probation Officer Bernadette Rojas Howard and Assistant United States Attorney Patti Booth, and they are aware of the above and foregoing sentencing recommendation.

SCOTT M. ELLISON